

Certified
JAN 16 1998

Pina Brooks Swift, et al.,
against Record No. 980063
George M. Hampton, Sr., et al.

Appellants,

Appellees.

Upon an appeal from a judgment rendered by
the Circuit Court of the City of Richmond on the
12th day of January, 1998.

Upon consideration of the appellants' petition for review pursuant to Code § 8.01-626 and appellees' motion to dismiss said petition, the Court hereby grants the said motion to dismiss. Omega Corp. v. Cobb, 222 Va. 875, 292 S.E.2d 44 (1981).

The consolidated petition for appeal and the motion for expedited consideration are hereby granted.

Upon consideration of the said petition for appeal and appellants' brief, the appellees' brief in opposition, and the argument of counsel, the Court is of opinion the circuit court did not err in refusing to grant the appellants' application for writ of mandamus because mandamus does not lie under the circumstances of this case. Richlands Medical Assoc. v. Commonwealth, 230 Va. 384, 337 S.E.2d 737 (1985).

The decision to meet in accordance with the requirement of Code § 24.2-679(B) that the State Board shall meet "as soon as possible" after it receives the returns for any special election is a matter within the sole discretion of the Board. The exercise of this discretion includes consideration of the time needed by the Board and its staff to perform the statutory duties necessary to insure the integrity and accuracy of the election results.

Accordingly, the order appealed from is affirmed.

JUSTICE KINSER, concurring in part and dissenting in part.

In this appeal, the sole assignment of error is whether "[t]he trial court erred by denying the Appellants' application for mandamus relief on the ground that scheduling a meeting to ascertain the returns 'as soon as possible' is a discretionary function on the part of the State Board of Elections, pursuant to Va. Code § 24.2-679(B)." Mandamus lies to compel the performance of a ministerial act by a public officer when there is a clear and unequivocal duty imposed by law upon the officer to perform the act and no other adequate remedy at law exists. May v. Whitlow, 201 Va. 533, 111 S.E.2d 804 (1960). A ministerial act is "one which a person performs in a given state of facts and described manner and obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Dovel v. Bertram, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). The issue is whether the direction of subsection B that the State Board shall meet "as soon as possible" confers discretion upon the State Board as to when it shall meet, thus making mandamus inappropriate.

Virginia Code § 24.2-679(B) requires that "[t]he State Board [of Elections] shall meet as soon as possible after it receives returns for any special election held at a time other than the November general election to ascertain the results of the special election in the manner prescribed in subsection A." I believe that the phrase "as soon as possible" means that the State Board of Elections shall meet to certify the results as soon as it has in its office all the information from the local electoral boards needed in order to prepare the statement specified in Va. Code § 24.2-679(A). This interpretation of the phrase "as soon as possible" comports with the distinction made by the General Assembly in subsections A and B of

§ 24.2-679. The State Board is not required to meet until the fourth Monday in November to ascertain the results of a regular November election. However, because of the urgency associated with any special election, the General Assembly realized that the State Board should meet immediately. Thus, instead of giving the State Board a certain amount of time in which to certify the results of special elections, it directed the State Board to meet as soon as it receives the required information from the localities.


Black's Law Dictionary, 1166 (6th ed. 1990) defines the term "possible" as "[c]apable of existing, happening, being, becoming or coming to pass Webster's Dictionary defines the phrase "as soon as" to mean "immediately at or just after the time that." Webster's Third New International Dictionary, 133 (1993). The word "soon" is defined as "at once; without delay; immediately." Id. at 2173.

Thus, I conclude that "as soon as possible" as used in Va. Code § 24.2-679(B) means that the State Board shall meet to certify special election results as soon as it receives the needed information from the local electoral boards. I find nothing discretionary about this requirement. Accordingly, I conclude that mandamus lies to compel the State Board of Elections to meet immediately or just after it receives the returns for the special elections.

I concur in the majority's dismissal of the appellants' petition for review regarding the request for injunctive relief.

This order shall be certified to the said circuit court.

Ordered that court be adjourned until Wednesday, January 14, 1998.



WEDNESDAY, JANUARY 14, 1998

MEMBERS OF THE COURT:

HARRY L. CARRICO, ESQUIRE,	CHIEF JUSTICE,
and	
A. CHRISTIAN COMPTON, ELIZABETH B. LACY, LEROY ROUNTREE HASSELL, SR., BARBARA MILANO KEENAN, LAWRENCE L. KOONTZ, JR. and CYNTHIA D. KINSER, ESQUIRES,	JUSTICES.

Tidewater Psychiatric Institute, Inc.,	Appellant,
against	Record No. 971635 Circuit Court No. CL94-4112
City of Virginia Beach,	Appellee.

From the Circuit Court of the City of Virginia Beach

Upon the petition of Tidewater Psychiatric Institute, Inc. an appeal is awarded it from a judgment rendered by the Circuit Court of the City of Virginia Beach on the 5th day of May, 1997; upon the appellant, or some one for it, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the trial court in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

Certified
JAN 14 1998